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No. 85-1685

Supreme Court, U.S.
FILED
MAY 16 1986
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1985

ANTHONY HERBERT,

Petitioner,

—v.—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., and ATLANTIC MONTHLY COMPANY,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENTS CBS INC., MIKE WALLACE AND BARRY LANDO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS ERRED IN ORDERING SUMMARY JUDGMENT FOR RESPONDENTS, MEDIA DEFENDANTS, WHERE TWO STATEMENTS IN A NEWS PROGRAM AND MAGAZINE ARTICLE ABOUT A PUBLIC FIGURE WHICH THE DISTRICT COURT HELD ACTIONABLE HAVE THE SAME DEFAMATORY STING AS OTHER STATEMENTS WHICH BOTH LOWER COURTS HELD ARE NOT ACTIONABLE.

II.

WHETHER THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER'S ALLEGED "OVERALL IMPORTS" ARE NOT ACTIONABLE WHERE SUCH "OVERALL IMPORTS" ARE IDENTICAL IN MEANING TO OTHER SPECIFIC STATEMENTS WHICH ARE NOT ACTIONABLE.

STATEMENT PURSUANT TO SUPREME COURT RULE 28.1

Excluding its wholly-owned subsidiaries, the following companies were subsidiaries or affiliates of Respondent CBS Inc. (sued herein as "Columbia Broadcasting, Inc.") as of December 31, 1985: April Music Publishing Company (Proprietary) Limited; Rainbow Programming Services Company II [Limited Partnership]; Entertainment Distributors Company Pty. Limited; Music Publishing Co. of Australia Pty. Limited; CBS Catalogue Partnership [Limited Partnership]; N.S. Beaujolais Music, Inc.; N.S. Justinian Music, Inc.; Golden Apple Music, Inc.; CBS Affiliated Catalog Inc.; CBS Feist Catalog Inc.; CBS Hastings Catalog Inc.; CBS Miller Catalog Inc.; CBS Robbins Catalog Inc.; CBS U Catalog Inc.; CBS Unart Catalog Inc.; CBS Variety Catalog Inc.; CBS Catalogue Partnership Holland B.V.; CBS Partnership Musikverlag GmbH; United Artists Music (Australia) Pty. Limited; United Partnership Limited; CBS Phoenix Musikverlag GmbH; Editions CBS Catalogue Partnership S.A.; Edizioni Musicali United Artists (Italy) S.r.1.; Resolute Casa Editrice Musicali S.r.1.; United Artists Music Japan Inc.; United Artists Musikforlag AB; United Artists Music (South Africa) Pty. Limited; Grammofonselskabs Distributions Centralen A/S; CBS Epic (Thailand) Limited; CBS Music (Thailand) Limited; CBS/FOX Company, The [General Partnership]; CBS/FOX VIDEO (Holdings) Ltd.; CBS/FOX VIDEO Limited; CBS/FOX VIDEO (Germany) G.m.b.H.; CBS/FOX VIDEO (South Pacific) Pty. Ltd.; CBS/FOX VIDEO (Canada) Ltd.; CBS/FOX VIDEO (Espanola) S.A.; CBS/FOX VIDEO French Film Licensing Corp.; CBS/FOX VIDEO (France) S.A.; CBS/FOX VIDEO International S.A.R.L.; CBS/FOX VIDEO (New Zealand) Limited; CBS/FOX VIDEO (Far East) K.K.; CBS Gramophone Records and Tapes (India) Limited; CBS Disques S.A.; Editions CBS Songs S.A.R.L.; CBS/MTM Company [General Partnership]; CBS Nigeria Limited; CBS Records (Kenya) Limited; PEC Musiikkitukku OY; Music Service Center Ge-

sellschaft m.b.H; CBS/SONY Group Inc.; SD Kansai Inc.; CBS/SONY Inc.; CBS/SONY Family Club, Inc.; CBS/SONY Records Inc.; April Music Inc. (Japan); CBS/SONY California, Inc.; EPIC/SONY, Inc.; CBS/SONY Hong Kong Limited; CBS/Sony Publishing Inc.; Japan Record Distribution System, Inc.; Music Plaza, Inc.; SD Hokkaido Inc.; Shorewood Packaging Company Limited; CBS Songs Music Publishing Co. Ltd.; The Rainbow Service Company [General Partnership]; Gramophone Record Company (Proprietary) Limited; Igaku-Shoin/Saunders Ltd.; Shorewood Packaging Corp. of Canada Limited; Trintex [General Partnership]; Mainstream Communications Corp.; Maindata, Inc.; SportsChannel Chicago Associates [General Partnership]; Cablevision Programming New England Corporation; SportsChannel Associates [General Partnership]; SportsChannel Prism Associates [General Partnership]; Winterland Concessions Company; and Winterland Productions, Ltd.

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BRIEF OF RESPONDENTS CBS INC., MIKE WALLACE AND BARRY LANDO IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

Petitioner, a public figure libel plaintiff, seeks a Writ of Certiorari to review an Order of the United States Court of Appeals for the Second Circuit reversing the District Court's ruling that two subsidiary statements in a television broadcast and magazine article are actionable, affirming the District Court's ruling that Petitioner failed to state a separate cause of action for alleged "overall defamatory imports" and ordering dismissal of Petitioner's complaint.

The Court of Appeals found that Respondents had "ample support" for their view, repeated throughout the broadcast

and article "that Herbert lied about reporting war crimes to his superiors in Vietnam and therefore must have been relieved of command for other reasons." App. A at 14a. Because the two subsidiary statements and the "overall defamatory imports" which Herbert claimed were actionable had the same meaning as the non-actionable statements, the Court of Appeals dismissed the complaint. As we demonstrate below, the decision of the Court of Appeals was well grounded in logic and law.

Procedural History

Petitioner, Lieutenant Colonel Anthony Herbert, filed his complaint on January 25, 1974. Herbert claimed over $40 million in damages for a 1973 broadcast by Respondent CBS Inc. of an Emmy award winning segment of "60 Minutes" entitled "The Selling of Col. Herbert" and for an article in *The Atlantic Monthly* entitled "The Herbert Affair." Petitioner named as defendants: (1) CBS Inc., (2) CBS correspondent Mike Wallace, (3) Barry Lando, a "60 Minutes" producer and author of *The Atlantic Monthly* article, and (4) The Atlantic Monthly Company.

After years of extensive discovery,[1] Respondents moved for summary judgment. In his opposition to that motion Petitioner identified the eleven statements which he claimed were false, defamatory and published with actual malice. On October 10, 1984 the District Court granted Respondents' motion as to nine of the eleven statements and denied Respondents' motion as to the remaining two statements. The District Court also granted summary judgment dismissing the action against

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1 Discovery in this case has been truly massive. Nearly 3000 pages of transcript were generated in the first year of discovery by the Lando deposition alone. *See Herbert v. Lando*, 441 U.S. 158, 205 n.3 (dissenting opinion of Marshall, J.). Respondents had also produced to Petitioner all of their notes of interviews with more than 120 people, all their research files, videotapes and transcripts of all filmed interviews, and scores of other documents. After this Court's 1979 decision, Respondents answered questions about their "editorial processes," investigation and research.

The Atlantic Monthly. Herbert v. Lando, 596 F. Supp. 1178 (S.D.N.Y. 1984) (Haight, J.).

Petitioner made a motion for reargument, advancing for the first time four additional statements he claimed were published with actual malice and several "overall imports" allegedly derived from the telecast and article "as a whole." Respondents thereafter moved to dismiss the entire action on the ground that the two statements remaining for trial were not actionable because, as a matter of law, given the non-actionable statements, they could not have harmed Petitioner's reputation. The District Court denied Petitioner's motion for reargument, *Herbert v. Lando*, 603 F. Supp. 983 (S.D.N.Y. 1984), and Respondents' motion to dismiss,[2] and certified all rulings for immediate appeal pursuant to 28 U.S.C. § 1292(b).

The United States Court of Appeals for the Second Circuit unanimously affirmed: (1) the ruling that nine of Petitioner's eleven proffered statements were not actionable; (2) the order dismissing *The Atlantic Monthly*; and (3) the order denying Petitioner's motion for reargument which attempted to raise Petitioner's four additional alleged defamatory statements and the alleged "overall imports." The Court of Appeals unanimously reversed the District Court's ruling that the two remaining statements were actionable and ordered dismissal of the complaint. *Herbert v. Lando*, 781 F.2d 298 (2d Cir. 1986). Petitioner did not petition for rehearing or rehearing *en banc* in the Court of Appeals.

Statement of Facts

Petitioner, Lieutenant Colonel Anthony Herbert, sought and received widespread media attention following a tour of duty in Vietnam in 1968-69. Herbert, a battalion commander in Vietnam, accused his superiors of having relieved him of

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2 The District Court's unpublished April 4, 1985 Opinion and Order denying Respondents' Motion to Dismiss is annexed hereto as an Appendix ("App.").

command because he reported war crimes to them. Petitioner made these charges on television talk shows and through other media channels, and described them in his book entitled "Soldier." The February 4, 1973 "60 Minutes" broadcast reported Herbert's claims and the results of an investigation of those claims. Three months later *The Atlantic Monthly* published an article written by Barry Lando entitled "The Herbert Affair" which again described Herbert's claims and what the investigation of those claims showed, and countered Herbert's post-broadcast attacks against the "60 Minutes" segment.

The investigation which culminated in the broadcast and article lasted over a year and involved more than 120 witnesses and thousands of pages of documents. Lando and Wallace interviewed scores of persons who knew Herbert, many of whom Herbert himself had recommended as sources who supposedly would corroborate his assertions. Lando spoke to Herbert on at least twenty-five occasions and six in-person interviews of Herbert were conducted. By the time the investigation was complete, Respondents had gathered massive and incontrovertible evidence which undermined Herbert's claims that he had reported war crimes to his superiors and had been relieved of his command because they were intent on covering up those reports.

Herbert's most serious charge was that on February 14, 1969 he reported a massacre of detainees at Cu Loi (the "Cu Loi Killings") to his superior, Colonel J. Ross Franklin. Franklin denied that claim, and Lando's investigation showed that Herbert could not have reported to Franklin because Franklin was in Hawaii on that day. Moreover, the persons and records Petitioner said would corroborate his claim did not do so.

Men who had known Herbert in Vietnam contradicted his claim that he had been relieved for reporting war crimes. The transcript of the Army's investigation into Herbert's relief provided documentary proof that Herbert had not been relieved for reporting war crimes. At no time did Herbert or any of the other thirty-eight witnesses who testified at the investiga-

tion mention that war crimes had anything to do with Herbert's relief from command. Indeed, Herbert's own testimony supported the conclusion of the inquiry: Herbert could not get along with other members of the brigade staff. In fact, it was not until seventeen months after his relief that Herbert finally prepared and submitted a written war crimes report. At that time, extensive publicity surrounded the My Lai trials at Fort McPherson, Georgia, where Herbert was then stationed.

Although Herbert claims the Army's investigations[3] were a "whitewash," Lando spoke to three Army officers recommended by Herbert: none could corroborate Herbert's story. In fact, of the three, the one officer who had first hand knowledge of the investigations said that they were comprehensive and that he was convinced Herbert had not reported war crimes to his superiors.

Herbert also denied any involvement in brutality or mistreatment of the Vietnamese. Several men whom Lando interviewed, however, described incidents where Herbert had either participated in or condoned acts of brutality.

As both Petitioner (*see, e.g.*, Petition at 4) and the Court of Appeals (App. A at 14a) recognized, the alleged defamatory effect of the broadcast and the article was to question the honesty of Petitioner's claims that he had been relieved because he had reported war crimes to his superiors in Vietnam. Among the statements in the article and broadcast which either are not now challenged by plaintiff, or which have been found by both courts below to be non-actionable are:

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3 There were four investigations which the Army initated at Herbert's instance: (1) an investigation pursuant to Article 138 of the Uniform Code of Military Justice; (2) a Criminal Investigation Division investigation into Herbert's allegation that he had reported war crimes to Franklin who failed to act; (3) an investigation into Herbert's court-martial charges against Franklin for failure to report and investigate war crimes reported to him by Herbert and (4) an investigation into Herbert's court-martial charges against Barnes for failure to report and investigate war crimes charges reported to him by Herbert. All of these charges were rejected. *See* App. A at 3a-4a; App. B at 39a-40a.

—We "spoke with more than a hundred and twenty people . . . . One after another refuted many of Herbert's claims." Article p. 76.

—"Herbert claims there are several people who had seen Franklin in Vietnam on February 14 . . . . Not one of those people . . . could back Herbert's claim." *Id.* at 78.

—"Hill denied telling Herbert he was certain he had seen Franklin returning to Vietnam on February 14 . . . . Hill also vehemently denied telling Herbert he couldn't talk because he was worried about his career." *Id.*

—"After talking with scores of men who had known Herbert in Vietnam . . . we could not find a single person who believed that Herbert had been relieved for trying to get war crimes investigated." *Id.*

—"I thought it inconceivable that Herbert was telling the truth." *Id.* at 79.

—"We checked some tales in *Soldier* about Herbert's exploits prior to Vietnam. One after another, the stories he told were refuted. . . ." *Id.* at 80.

—Herbert claimed he had documents which "demonstrated that the Army had been out to ruin him . . . . In fact, the documents say nothing of the kind." *Id.* at 81.

—Bill Hill's opinion that "Herbert has gone off the deep end on a bunch of this . . . for some reason he's become a liar, it's all so much garbage." *Id.* at 78.

—Ken Rosenblum's statement that "when it came to the critical facts, the people he had told us would support his claims just did not. You know, I think he has reached the point where he really believes his charges." *Id.* at 79.

—Grimshaw "denied that the incident [in *Soldier*] had ever occurred." He wrote, "I would do what I could to help him—anything, except lie." *Id.* at 80.

—Otto Skorzeny's statement that "everything is invented from A-Z." *Id.*

—S.L.A. Marshall's conclusion that "[a]s for where truth lies in this incident" if Herbert's recollection of Vietnam is no better than that of Korea, "the grading should be zero minus . . . . I say that he dilates expansively on things that never happened." *Id.*

—Herbert's superior, Colonel Franklin, was in Hawaii on the Valentine's Day that Herbert claimed he reported war crimes to Franklin in Vietnam. Program Transcript at 5-6.

—The vehement denials of Barnes and Franklin that Herbert had ever reported war crimes to them. *Id.* at 4.

—Herbert had made up "totally fictional charges" that were "a hoax on the American people." *Id.* at 5.

—Herbert had "no documents to show, not a piece of paper to show" that he "ever reported a war crime to anybody" prior to being relieved. *Id.* at 7.

—The denials of Douglass and Rector of Herbert's claims that Herbert had mentioned war crimes to them as a reason for relief. *Id.* at 8-9.

—Evidence from comprehensive and far-reaching investigations by the Army and others that refuted Herbert's charges. *Id.* at 9-10.

—Denunciations of the fabricated stories which appear in Herbert's book, *Soldier. Id.* at 6, 8, 13-16.

The only statement from the article which the District Court ruled to be actionable is the statement that Sergeant Major Bittorie, an Army officer who served with Petitioner in Vietnam, "had no sons." The statement appears in the following context:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outside office when Herbert reported to

> Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. *He had no sons.*

App. B at 90a (emphasis added).

The only statement in the broadcast ruled actionable was:

> We have spoken with many men who saw Herbert after his relief in Vietnam *ye to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.*

App. B at 101a (emphasis added). With respect to that statement, the District Court accepted Petitioner's argument that it was defamatory in that it implied that Petitioner was dishonest in his claim that he reported war crimes to his superiors prior to being relieved. App. B at 102a.

In reversing the District Court's partial denial of summary judgment, the Court of Appeals found that both statements' imputation of dishonesty (lying about whether Petitioner reported war crimes to his superiors prior to being relieved) was the *same* imputation of dishonesty repeatedly (and much more directly and emphatically) made throughout the broadcast and article in passages either not challenged or ruled non-actionable. Because the Court of Appeals held that the two remaining statements added nothing to the portions of the broadcast and article held to be non-actionable, it did not reach the issue of whether Petitioner had submitted sufficient evidence of falsity and actual malice to defeat a motion for summary judgment as to those two claims.

In sum, Respondents' lengthy investigation discredited Herbert's claims that he had reported war crimes to his superiors and had been relieved of command for that reason.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

Petitioner has offered no persuasive reason for this Court to review this protracted litigation for a second time. The unanimous Court of Appeals decision is fully consistent with this Court's prior decisions and represents a reasoned, conscientious application of the First Amendment actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Twelve years of litigation have established that the alleged inaccuracies in the two remaining statements at issue are unimportant and subsumed entirely in broader, non-actionable statements disputing Herbert's claims about the reasons for his relief. Moreover, application of the incremental harm branch of the libel proof doctrine and the doctrine of substantial truth also produce the same result as that reached by the Court of Appeals. As a matter of law, Petitioner has no action for defamation on these facts. The ruling of the Court of Appeals does not conflict with decisions of other circuits or of this Court, raises no important issues of federal law, and should not be reviewed by this Court.

Petitioner's six alleged "overall imports," raised for the first time on his motion for reargument in the District Court, are not actionable as a matter of law. The Court of Appeals correctly ruled that because each "overall import" is identical in meaning to one or more of Petitioner's non-actionable "specific" statements, the "overall imports" cannot be an independent basis for a libel action. That ruling raises no constitutional or other important issues, does not conflict with any decisions of other circuits or of this Court, and does not entitle Petitioner to the Writ.

Petitioner specifically urged the District Court to apply the clear and convincing evidence standard in ruling on Respondents' summary judgment motion. This Court should not

grant review to entertain Petitioner's belated challenge to the very analysis he endorsed below.

The Petition amounts to an argument that a jury issue is created by any post-publication affidavit asserting that prior to publication the defendant was told something inconsistent with the broadcast or article even though the alleged inaccuracy adds nothing to the meaning or effect of the challenged publication. No case in this Court or elsewhere supports such an argument.

I.

THE NARROW, FACT-SPECIFIC HOLDING BELOW DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND PRESENTS NO ISSUE OF IMPORTANCE WARRANTING THIS COURT'S REVIEW

In his Petition, Herbert vehemently attacks the primary holding of the Court of Appeals that his case fails under the actual malice standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) and its progeny. Petitioner's rhetoric notwithsta ding, the Second Circuit's unanimous[4] opinion is fully supported by three related defamation law defenses: (1) the *New York Times* actual malice privilege; (2) the incremental harm branch of the "libel-proof" defense; and (3) the defense of substantial truth.[5] Each of these defenses is an independent ground supporting the result below.

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4 Petitioner's 21 references in his Petition to "Judge Kaufman" cannot change the fact that the opinion of the Second Circuit's three-judge panel was unanimous. Petitioner did not petition for a rehearing *en banc* in the Court of Appeals.

5 Petitioner's attack on the Court of Appeals decision is limited to its dismissal of the two statements ruled actionable by the District Court and to both courts' refusal to permit suit on his "overall imports." Petitioner's only challenge to the rulings that nine of his proffered statements are not actionable is based on the District Court's application of the standard of convincing clarity, a result he himself advocated. *See* Discussion Point III, *infra*.

A. The Unanimous Holding of the Court of Appeals, that Minor Alleged Factual Inaccuracies Implying the Same View as Broader Non-Actionable Statements Does Not Entitle Petitioner to a Jury Trial, is Sound and Should Not Be Reviewed by This Court

The Second Circuit's opinion represents a reasoned application of the *New York Times* actual malice standard to the particular facts of this case. The opinion recognizes that the only possibly defamatory meaning of the two remaining statements is that Herbert lied about having been relieved for reporting war crimes.[6] Because the District Court and the Court of Appeals ruled that those primary, broader statements are not actionable, then in logic and in law the two remaining related statements that say precisely the same thing cannot as a matter of law support a jury finding of actual malice.[7] *See Mr.*

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6 In the statement of facts of its earlier opinion in this case, this Court recognized that Herbert's basic claim is that the article and broadcast "portrayed him as a liar and a person who had made war-crimes charges to explain his relief from command." *Herbert v. Lando*, 441 U.S. at 156. Petitioner concedes that the "program *in toto* may be fairly characterized as a defamatory attack upon petitioner's honesty and integrity" and that the thrust of the article was "similar." Petition at 4.

7 Respondents had considerable support for the two remaining statements. For example, Respondents interviewed many men who denied that Herbert had told them he had been relieved for reporting war crimes. Moreover, Respondents knew that not one of thirty-nine witnesses (including Herbert) who testified at the Article 138 hearing into Herbert's relief said that it had anything to do with war crimes. The fact that one individual (Kahila) has a different recollection of an interview cannot raise a jury issue of actual malice. *Long v. Arcell*, 618 F.2d 1145, 1148 (5th Cir. 1980), *cert. denied*, 449 U.S. 1083 (1981). This is especially so here, where Lando's notes indicate that Kahila's recollection of the event in question has been far from consistent. *See* App. B at 103a-105a. *See also* p. 20 *infra*. Similarly, Respondent Lando's note of his interview with Bittorie indicates that he believed Bittorie had "no sons, one daughter." Lando knew that Bittorie (and abundant other evidence) supported the conclusion that Herbert had not reported war crimes while in Vietnam. Further, Petitioner's reliance now on Bittorie's denial alone to show actual malice is totally disingenuous because Petitioner told Lando that Bittorie was *not* to be believed.

Chow of New York v. Ste. Jour Azur S.A., 759 F.2d 219, 231 (2d Cir. 1985); *Marcone v. Penthouse*, 754 F.2d 1072, 1084 (3d Cir.), *cert. denied*, ____ U.S. ____, 106 S. Ct. 182 (1985); *Cervantes v. Time, Inc.*, 464 F.2d 986, 995 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). *See also Bartimo v. Horsemen's Benev. and Protective Ass'n*, 771 F.2d 894, 898 (5th Cir. 1985), *cert. denied*, ____ U.S. ____, 54 U.S.L.W. 3691 (1986).

The Court of Appeals holding does not conflict in any way with prior decisions of this Court. Moreover, a summary judgment order in a case where exhaustive discovery was conducted and completed raises no issues of importance which merit this Court's further review. Petitioner, after being allowed the broadest possible discovery, has been unable to identify *any* false statement which bears a distinct defamatory meaning that was published with actual malice. *See Schultz v. Newsweek*, 668 F.2d 911, 918 (6th Cir. 1982).

The unanimous Court of Appeals decision specifically notes that its "holding is thus limited to those cases in which statements allegedly made with knowing falsity or reckless disregard give rise to defamatory inferences that are only supportive of inferences that are not actionable."[8] Contrary to Petitioner's assertion (Petition at 16 & 16 n.12), District Judges are quite accustomed to determining the reasonable meaning or meanings a given statement is capable of bearing. *See Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6, 14 (1970); *Hallmark Builders v. Gaylord Broadcasting*, 733 F.2d 1461, 1464 (11th Cir. 1984); *Church of Scientology of California v. Cazarez*, 638 F.2d 1272, 1286 (5th Cir. 1981); *Cianci v. New Times Publishing Co.*, 639 F.2d 54, 60 (2d Cir.

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8 Petitioner's hypothetical example allegedly demonstrating the unsound analysis below is that of a specific, false statement of fact supporting an opinion that a judge is a racist. Petition at 17. That analogy is totally inapt. Under the circumstances described, the purported opinion itself would be actionable because it is based on false facts allegedly supporting it. *See generally Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, U.S. 105 S. Ct. 2662 (1985); Restatement (Second) of Torts § 566 (1977).

1980); *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1375 (S.D. N.Y. 1985). The Court of Appeals holding requires nothing more. Where, as here, those meanings are not actionable, the action must be dismissed.

The Court of Appeals held that the thrust of the publications and the meaning of all the alleged libels were "that Herbert had not reported war crimes to his superiors in Vietnam, and therefore must have been relieved for other reasons." App. A at 21a. The Court of Appeals held that Respondents had "ample grounds to support [those] conclusions," and that the two statements cited by Petitioner have the same meaning. *Id.* The possibility that Respondents may have misstated two minor, related facts does not justify this Court's review or a jury evaluation of Respondents' states of mind. *See Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971); *Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 510 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978); *Ryan v. Brooks*, 634 F.2d 726, 731 (4th Cir. 1980); *Trapp v. Southeastern Newspapers*, 10 Media L. Rptr. 1985, 1991 (S.D. Ga. 1984).

On this record, Petitioner cannot prove that the two alleged minor inaccuracies were published with the requisite "intent to inflict harm through falsehood." *Henry v. Collins*, 380 U.S. 356, 357 (1965). Even if there were some minor factual inaccuracies, they "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.' " *New York Times v. Sullivan*, 376 U.S. 254, 271-72 (1964) (citations omitted). In the context of this discussion about a matter of the highest public concern, the First Amendment requires the protection of minor inaccuracies which can occur in any journalistic endeavor "in order to protect speech that matters." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974).

B. Application of the Incremental Harm Branch of the Libel-Proof Doctrine Produces the Same Result as the Court of Appeals Decision

After twelve years of litigation involving exhaustive and painstaking discovery, Petitioner's libel trial here would have been limited by the District Court to one insignificant statement in a twenty minute television broadcast and one insignificant statement in a nine page magazine article. Recognizing the incongruity of such a result, the Court of Appeals discussed the "incremental harm branch of the libel-proof plaintiff doctrine" and even recognized that "[s]ome may view our holding today as a variation of the 'libel-proof' doctrine but we need not so characterize it." App. A at 21a n.10.

The incremental harm branch of the libel-proof doctrine, grounded in the First Amendment, *Wynberg v. National Inquirer, Inc.*, 564 F. Supp. 924, 928 (C.D. Cal. 1982), has found acceptance in many lower courts.[9] The libel-proof defense "protects disseminators of news and views on public issues against burdensome litigation commenced by plaintiffs having no likelihood of significant recovery." *Sharon v. Time, Inc.*, 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983). In *Simmons Ford v. Consumers Union of the United States*, 516 F. Supp. 742 (S.D.N.Y. 1981) (Weinfeld, J.), for example, the plaintiffs challenged only one of several statements in an article describing the faults of plaintiffs' electric car. The court concluded that "the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article" and granted the defendants' motion for summary judgment. *Id.* at 750.

While several courts have recognized the doctrine but declined to dismiss actions on that basis, *e.g.*, *Sharon v. Time,*

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9 The doctrine was first applied in cases involving plaintiffs whose reputations were so bad they had nothing left to lose. *E.g.*, *Cardillo v. Doubleday & Co.*, 518 F.2d 638, 640 (2d Cir. 1975) (prior criminal conviction); *Ray v. Time, Inc.*, 452 F. Supp. 618, 622 (W.D. Tenn. 1976), *aff'd w.o. opinion*, 582 F.2d 1280 (6th Cir. 1978).

Inc., 575 F. Supp. 1162, 1168 (S.D.N.Y. 1983); *Bose Corp. v. Consumers Union of United States, Inc.*, 529 F. Supp. 357, 362 (D. Mass. 1981), *rev'd on other grounds*, 692 F.2d 189 (1st Cir. 1982), *aff'd*, 466 U.S. 485 (1984); *Gannett Co. v. Re*, 496 A.2d 553, 558 (Del. 1985), their rationale is not applicable here. In each of those cases, the courts determined that the actionable statement had a different and more harmful meaning than the non-actionable statements. *E.g.*, *Sharon v. Time, Inc.*, *supra*, 575 F. Supp. at 1171 ("[n]o finding or statement in the report or in the article is comparable in its seriousness and potential reputational impact to the statement upon which this suit is based.").[10] As the unanimous Court of Appeals recognized, this case is very different. Here, the remaining two statements "merely imply the same view, and are simply an outgrowth of and subsidiary to those claims upon which it has been held there can be no recovery." App. A at 23a.

It is clear that the nine statements held to be non-actionable all impugned Herbert's veracity with regard to his claim of reporting war crimes. Both the District Court and the Court of Appeals reasoned that the statement in the article that Bittorie "had no sons," in context, likewise challenged Herbert's credibility. App. B at 91a; App. A at 22a. The gist or sting of this paragraph, that Bittorie denied Herbert's assertion that Bittorie overheard Herbert's report of water torture, is a much more serious challenge to Herbert's credibility. Herbert does not even challenge *that* defamatory gist; he contests only Respondents' knowledge about Bittorie's offspring.

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10 The court in *Liberty Lobby v. Anderson*, 746 F.2d 1563, 1568 n.6 (D.C. Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2672 (1985), criticized the libel-proof doctrine but acknowledged that at some point repeated attribution of a particular character flaw (such as accusing someone of committing 35 burglaries when the true number is 34) would not be actionable. In this case the sole defamatory content of the two actionable statements is that Herbert is a liar—a theme which is returned to throughout the program and the article and is, as the Courts below noted, no different from the other non-actionable statements to the same effect. Petitioner's case is strikingly similar to that of the hypothetical plaintiff described in *Liberty Lobby*.

As set forth above, the article is replete with statements, some unchallenged and some ruled non-actionable, directly attacking Herbert's credibility (*see* pp. 6-7 *supra*). In the light of all these direct attacks on Herbert's credibility, the trivial "no sons" sentence could not possibly have caused incremental harm to Herbert's reputation and would not entitle him to more than nominal damages.

Similarly, as the courts below recognized, the "to a man" statement merely accuses Herbert of lying when he claimed he was relieved for reporting war crimes. App. A at 22a; Ap. B at 102a. As set forth above, the broadcast, like the article, contains abundant evidence and statements of identical import (*see* p. 7, *supra*). Viewed in context, the "to a man" statement simply could not have harmed Herbert's reputation beyond the harm caused by the non-actionable statements which accuse Herbert of lying about having been relieved for reporting war crimes.[11]

The decisions in *Bose*, *Cardillo* and *Simmons Ford*, *supra*, all indicate that the potential for a *de minimis* or nominal recovery does not justify forcing Respondents to trial. *See Jackson v. Longcope*, 394 Mass. 577, 476 N.E.2d 617, 619-20 (1985). *Cf. Sharon v. Time, Inc.*, 599 F. Supp. 538, 586 (S.D. N.Y. 1984) (plaintiff entitled to jury trial where only paragraph challenged is different in meaning and more defamatory than any other statement in the article). Under the incremental harm branch of the libel-proof doctrine, therefore, the "to a man" statement and the statement that Bittorie "had no sons" are not actionable as a matter of law.

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11 The District Court held the libel-proof doctrine inapplicable here because, *inter alia*, Herbert challenged many of the statements held to be non-actionable. *See* App. at 3a. The key to application of the doctrine is whether the purportedly actionable statement has the same meaning, or a less harmful meaning, than the non-actionable statements, not whether the non-actionable statements had been challenged at some point in the litigation. Otherwise, every plaintiff could challenge every statement in an article or broadcast and easily escape the doctrine.

C. Application of the Substantial Truth Doctrine Produces the Same Result as the Court of Appeals Decision

Truth is always an absolute defense to a libel action. *See Cox Broadcasting Corp. v. Cohen*, 420 U.S. 469, 490 (1974); *Garrison v. Louisiana*, 379 U.S. 64 (1964). Although Petitioner is correct in his repeated statements that the First Amendment does not protect distinct false statements of fact published with actual malice, he cannot dispute that, as a public figure libel plaintiff, he "must show the falsity of the statements at issue in order to prevail on [his] suit for defamation." *Philadelphia Newspapers, Inc. v. Hepps*, ____ U.S. ____, No. 84-1491, slip op. at 8 (April 21, 1986), *citing Garrison v. Louisiana*, 379 U.S. 64, 74 (1964) and *Herbert v. Lando*, 441 U.S. 153, 176 (1979).[12]

To avoid summary judgment, a public figure libel plaintiff must show that there is a material and disputed issue of fact as to the falsity of the statement at issue. More than literal falsity must be shown. If the statement is substantially true, summary judgment must be granted. *Anderson v. Cramlet*, No. 85-1026, slip op. (10th Cir., April 29, 1986).

The test for substantial truth is well settled. The issue is "whether the libel as published would have a *different effect* on the mind of the reader from that which the pleaded truth would have produced." *Korkala v. W.W. Norton & Co.*, 618 F. Supp. 152, 155 (S.D.N.Y. 1985) (emphasis added). *Accord*, *Wehling v. CBS*, 721 F.2d 506, 509 (5th Cir. 1983); *Orr v. Argus-Press*, 586 F.2d 1108, 1112-13 (6th Cir. 1978), *cert. denied*, 440 U.S. 960 (1979); *Strada v. Connecticut News-*

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12 In *Hepps*, as in *Dun & Bradstreet v. Greenmoss Builders*, ____ U.S. ____, 105 S. Ct. 2939 (1985), this Court noted that First Amendment protection is greater where statements involve matters of public concern. Obviously the subject-matter of the broadcast and article at issue herein is at the very core of the First Amendment. *See Ollman v. Evans*, *supra*, 750 F.2d at 1002 (concurring opinion of Bork, J.). "Few other discussions of public concern could make a greater claim for First Amendment protection." *Janklow v. Newsweek*, 12 Media L. Rptr. 1961, 1964-65 (8th Cir. 1986) (*en banc*) (report on dispute between governor and Native American leader).

papers, Inc., 193 Conn. 313, 477 A.2d 1005, 1010 (1984); *Mark v. Seattle Times*, 96 Wash.2d 473, 635 P.2d 1081, 1092 (1981), *cert. denied*, 457 U.S. 1124 (1982); *Fleckenstein v. Friedman*, 266 N.Y. 19, 23, 193 N.E. 537 (1934). Put another way, a statement is not actionable "if the 'gist' or 'sting' of the statement is true." *Hamer v. Dow Jones*, 12 Med. L. Rptr. 1777, 1778 (W.D. La. 1986). *See also Gomba v. McLaughlin*, 180 Colo. 332, 504 P.2d 337, 338 (1972) (where odium of true statement would have been the same as that conveyed by literally false statement, substantial truth is established).

The only statement in the Atlantic Monthly article found actionable by the District Court is that Bittorie "had no sons." This statement (underscored below) appears in the following context:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outside office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia to interview Bittorie, he again denied having overheard any such report. What about his sons who are in the Army? I asked. *He had no sons.*

Under the substantial truth doctrine,[13] this statement is not actionable as a matter of law. Without question, the gist or defamatory sting of the statement is that Bittorie denies Herbert's claim that Bittorie overheard him report war crimes to Colonel Franklin. Whether or not Bittorie had a son in the Army is an innocuous, subsidiary and collateral fact that does not alter the effect of the statement on the mind of the reader. As the Tenth Circuit held in *Rinsely v. Brandt*, 700 F.2d 1304,

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13 The Court of Appeals did not reach Respondents' argument based on that doctrine.

1308 (10th Cir. 1983), "any inaccuracy in the statement is too minor to be actionable."[14]

Respondents certainly do not concede that the "no sons" statement is inaccurate in any respect. However, there is no dispute that the following statement would have been absolutely true had it been included in the article:

> Herbert had also claimed that one of the brigade's top enlisted men, Sergeant Major John Bittorie, had been listening in an outer office when Herbert reported to Colonel Franklin an incident of water torture. When the Army CID questioned him, Bittorie denied Herbert's claim. Herbert told me the reason was that although Bittorie himself was retired, he still had two sons in the service and had to worry about their careers. But when I flew to Columbus, Georgia, to interview Bittorie, *he told me that he had one son in the army but* he again denied having overheard any such report.

Under the "different effect" test for substantial truth, the "no sons" remark is not substantially false. The Court of Appeals correctly ruled it is not actionable.[15]

The only statement in the broadcast which the District Court held to be actionable was the following underscored statement which Petitioner identified in opposing Respondents' summary judgment motion:

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14 The District Court accepted that an issue of fact was raised concerning whether the statement about Bittorie's sons was false and published with actual malice based on an affidavit by Bittorie that he had told Lando that he had one son who was in the army—although neither Bittorie nor Herbert contests that Bittorie, in the same affidavit, denied hearing Herbert's alleged report of a water torture incident. App. B at 91a.

15 Petitioner's reliance on *Westmoreland v. CBS*, 596 F. Supp. 1170 (S.D.N.Y. 1984) is misplaced. There, plaintiff claimed that the defendants' editing "gave [the statement] a *different meaning* and made it seem as if an important member of General Westmoreland's intelligence staff was making an accusation he had in fact not made." *Id.* at 1175 (emphasis added). Petitioner can make no such claim here.

> Wallace's statement: "We have spoken with many men who saw Herbert after his relief in Vietnam *yet to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges.*

Without conceding that the above statement is in any respect inaccurate, Respondents submit that the following uncontested statement could have been published:

> We have spoken with many men who saw Herbert after his relief in Vietnam: nine out of ten of them say Herbert never once said to them that he had been relieved because he tried to push war crimes charges. Furthermore, none of the 39 people who testified at an inquiry into Herbert's relief—including Herbert himself—said he had been relieved because he tried to push war crimes charges.

Petitioner has not challenged the fact that nine of ten people asked stated that Herbert "never once said to them that he had been relieved because he had tried to push war crimes charges." In fact, the evidence shows that Respondents had ample support for the view that no one ever said Herbert "had been relieved because he had tried to push war crimes charges."

The District Court accepted that an issue of fact was raised concerning whether the "to a man" statement in the broadcast was false and published with actual malice, App. B at 105a, based on the affidavit of a former helicopter pilot and friend of Herbert's (Kahila) in which he said that he had told Lando that "Col. Herbert said his relief was part of Army politicking resulting from his reporting the Cu Loi killings and Brigade's view that what to do about it had become a problem." However, it is clear that:

(a) Kahila (in a statement to which Lando had access) said in response to a question from Herbert's lawyer as to whether Herbert had discussed the killings on the day of his relief that "Herbert did not say much that day, he was too upset," Eldridge Reply Affidavit submitted on Defendants' Motion for Summary Judgment, exh. E, at 5;

(b) Herbert's alleged conversation with Kahila concededly took place prior to Herbert's arrival in Saigon—and Herbert testified that prior to his arrival in Saigon he had not told anyone that his relief was related to reports of war crimes. *See* Herbert Dep. at 2953-54; *see also* Herbert Dep. at 2271-72, 2471-72, 2845; Herbert's testimony in the Barnes investigation;

(c) In response to a request for evidence that the broadcast statement was false, the only persons Herbert identified in his deposition were Colonel Douglas and General Rector—Kahila was not mentioned. Herbert's Dep. at 2471-72. *See also* Plaintiff's Exh. 21 to Lando Dep. at 9. It is undisputed that Douglas, Rector and each one of the other persons contacted other than Kahila denied Herbert's claim; and

(d) Herbert does not challenge what the transcript of the Army inquiry into his relief shows: that none of the 38 people who testified at the inquiry suggested that Herbert had ever reported war crimes prior to his relief. Indeed, as noted above, at that Army hearing, which Herbert requested, Herbert himself never suggested that his relief was in any way related to any attempt to report war crimes. *See* Lando Affidavit submitted on Defendants' Motion for Summary Judgment, exh. 9.

The gist or sting of the broadcast statement is not substantially false. Consideration of the "to a man" statement in context compels the holding that it could not have had a different effect on the mind of the viewer than Petitioner's version of the truth would have had. Under the substantial truth doctrine, the statement is not actionable as a matter of law. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 914 (2d Cir.), *cert. denied*, 434 U.S. 834 (1977). This Court should not review the holding of the Court of Appeals that Respondents are entitled to summary judgment.

II.

THE COURT OF APPEALS CORRECTLY HELD PETITIONER'S "OVERALL IMPORTS" ARE NOT ACTIONABLE

In his motion for reargument in the District Court and in the Petition, Petitioner has identified the following six meanings allegedly "generated by both publications as a whole":

> (1) petitioner had failed to report war crimes while serving with the 173d Brigade; (2) petitioner had made no effort to report war crimes until after My Lai was in the news; (3) during the My Lai publicity, petitioner fabricated the war crimes reason for his relief from command to explain away other reasons for his being relieved; (4) the Army investigation was thorough and found no support for Herbert's charges; (5) petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese; (6) petitioner lied about reporting war crimes in Vietnam and his concerns about war crimes.

Petition at 7.

The District Court correctly denied Petitioner's motion for reargument, noting that Petitioner had not brought to the court's attention earlier the very issue and precedent he claimed, on reargument, the court had overlooked.[16] The

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16 The procedural history of Petitioner's vague "overall imports" demonstrates why the District Court refused to consider them. The complaint's allegations are, in the District Court's words, "general and conclusory" and bear little resemblance to the six "imports" now identified. When Petitioner responded to Respondents' summary judgment motion, he specified eleven specific statements he contended were actionable. He did not, in a 282 page brief, base a single argument on any "overall imports." Understandably displeased with the result of that motion, Petitioner claimed on reargument that he had raised that issue, referring to the topic headings of the background section of his brief. Even those vague topic headings differed significantly from the imports presented on reargument. Petitioner cannot dispute that the present formulation of his imports first appeared in his motion papers on reargument.

District Court's decision is also capable of two alternative interpretations: (1) that summary judgment was proper because Herbert failed to identify specific statements alleged to be false, defamatory and published with actual malice to support those "imports";[17] and (2) that Herbert's "overall imports" are not actionable because each one is identical in meaning to one or more of his "specific" statements which are not actionable. Each rationale fully supports the result below.

Even if Petitioner had preserved the point for review, his "overall imports" are not actionable. As the Court of Appeals held, these "imports" are identical to meanings held not to be actionable in the context of his eleven "specific" statements of fact. "To permit Herbert to rest a cause of action in this case on the publication's 'overall impact' would be a meaningless gesture, since the defamatory implications of the specific statements and the overall impact of the publications are identical." App. A at 14a-15a.

The Court of Appeals did not base its ruling on any constitutional principle but, rather, on Petitioner's failure to identify any "overall" statements which differed in meaning from his "specific" statements. A review of Petitioner's six

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17 The District Court severely criticized Petitioner for not identifying his six alleged meanings in his opposition to the motion for summary judgment. Nonetheless, the District Court discussed the nine decisions newly cited by Petitioner and found they "do not focus upon the analysis pursued in the Court's prior opinion." App. C at 136a. The District Court found Petitioner's argument "an unsuccessful effort to recast claims which discovery has demonstrated are not actionable." *Id.* After noting the strict pleading rules for defamation cases imposed by such cases as *Small v. ABC*, 10 Media L. Rptr. 2391, 2392 (N.D. Iowa 1984) (requiring "plaintiff to state in his complaint the exact words broadcast which were defamatory") and the New York rule requiring *in haec verba* pleadings (citing *Foltz v. McCormick Lines*, 189 F.2d 537, 539 (2d Cir.), *cert. denied*, 342 U.S. 871 (1951) and *Laiken v. American Bank & Trust Co.*, 34 A.D.2d 514, 308 N.Y.S.2d 111, 112 (1st Dep't 1970)), the court held that, "[a]fter comprehensive discovery, plaintiff has not shown, save for the two statements as to which summary judgment was denied, that a reasonable jury could find actual malice in respect of any statement uttered by any defendant." App. C at 148a.

"overall" statements demonstrates that the Court of Appeals was entirely correct.

(1) Petitioner had failed to report war crimes while serving with the 173d Brigade.

The meaning of this statement is identical to that of statements (a), (b), (g) and (j),[18] *i.e.*, that Herbert never reported war crimes to Barnes or Franklin. Both courts below ruled those statements were not actionable. Moreover, the gist of this "import" is identical to the unchallenged denial of Bittorie that he overheard Herbert report an incident of water torture. Accordingly, "overall" statement (1) is not actionable as a matter of law.

(2) Petitioner had made no effort to report war crimes until after My Lai was in the news.

(3) During the My Lai publicity, petitioner fabricated the war crimes reasons for his relief from command to explain away other reasons for his being relieved.

These statements are both identical in import to "specific" statements (a), (b), (c), (g) and (j), which reported, among other things, the facts that Herbert "had no documents to show . . . he ever reported a war crime prior to the time the My Lai trials were going on" and "it was only after Herbert was transferred to Ft. McPherson, that there is any solid indication he was thinking about reporting war crimes." Both courts below ruled that none of those statements is actionable.

(4) The Army investigation was thorough and found no support for Herbert's charges.

This statement is nothing more than an amalgam of "specific" statements (a), (b), (c), (d), (e) and (g), none of which is actionable, and all of which state that Herbert did not report

18 Petitioner's "specific" statements are listed in an appendix to the opinion of the Court of Appeals. App. A at 25a.

war crimes to his superiors. The gist of statement (4) is the same—Herbert did not report war crimes to his superiors. Moreover, the distinct statement that the Army investigation was "thorough" is identical to the statement, advanced by Petitioner for the first time on reargument, that reported Rosenblum's opinion that the investigation was not a "white-wash." The lower courts held that statement was untimely when offered on reargument, and Petitioner does not seek review of that ruling here.[19]

(5) Petitioner was a brutal man in his treatment of POWs and in condoning brutality against the Vietnamese.

The gist of this "import" is identical to "specific" statement (h), *i.e.*, that Herbert was present when a Viet Cong nurse was being beaten during an interrogation. The lower courts held that statement not actionable. In addition, the import has precisely the same meaning as the unchallenged statement in the broadcast of Sergeant Bruce Potter about an incident where Herbert jerked a Viet Cong detainee in and out the door of a helicopter in flight "to scare him into talking," as well as Wallace's report of a statement by a helicopter pilot named Plantz accusing Herbert of having "beaten up" a woodcutter and a Viet Cong prisoner. The courts below ruled the latter statement is not actionable.

(6) Petitioner lied about reporting war crimes, his own conduct in Vietnam and his concern about war crimes.

This statement is identical in import to "specific" statements (a), (b), (c), (d), (e), (f), (g), (h) and (i), all of which accuse Herbert of having lied about reporting war crimes and about his conduct in Vietnam. In addition, the statement in the article that Bittorie denied hearing Herbert report water torture is not challenged by Herbert and has exactly the same gist or sting as "overall import" (6).

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19 On reargument, the District Court also stated that the statement was non-actionable opinion. App. C at 149a.

The Court of Appeals correctly ruled that none of the above "imports" is actionable. The court has a duty, in the first instance, to determine the meanings words are reasonably capable of bearing. *E.g.*, *Davis v. Costa-Gavras*, 619 F. Supp. 1372, 1375 (S.D.N.Y. 1985); *Hoffman v. Washington Post Co.*, 433 F. Supp. 600, 603 (D.D.C. 1977), *aff'd mem.*, 578 F. 2d 442 (D.C. Cir. 1978). The Court of Appeals properly determined that Petitioner's "overall imports" are each identical to one or more non-actionable "specific statements."[20] This Court should not grant certiorari to reexamine that determination.

III.

THIS COURT SHOULD NOT ENTERTAIN PETITIONER'S ARGUMENT THAT THE STANDARD OF CONVINCING CLARITY SHOULD NOT HAVE BEEN APPLIED TO RESPONDENTS' SUMMARY JUDGMENT MOTION

Although he does not mention it in the "Questions Presented" section of his Petition, Petitioner contends that the Court of Appeals and the District Court erred in applying the "convincing clarity" standard to the question of actual malice in evaluating Respondents' Motion for Summary Judgment. Petitioner argues that because this Court recently granted certiorari and heard argument in *Liberty Lobby v. Anderson*, 746 F.2d 1563 (D.C. Cir. 1984), *cert. granted*, 105 S.Ct. 2672 (1985) (No. 84-1602), "[c]ertiorari [should] be granted and this

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20 Petitioner's reliance on *Cantrell v. Forest City Publishing Co.*, 419 U.S. 245 (1974) is totally misplaced. There, the plaintiff and the Court had identified a specific and distinct implied statement which was fabricated. Petitioner cannot make such a claim here. For the same reason, the other cases cited by Petitioner to support this argument (Petition at 20-21) are inapplicable here. As the Court of Appeals recognized, this is not a case where "a combination of individual statements which in themselves might not be defamatory might lead the reader to draw an inference that is damaging to the plaintiff." App. A at 13a.

petition be held over until such time as a decision in that case issues." Petition at 24.

According to Petitioner, he interposed "strenuous objections" to the use of the convincing clarity standard and "renewed" his objections to its use in the Court of Appeals. Petition at 22-23. To the contrary, Petitioner did not raise this issue until after the District Court had rendered its decisions. In fact, in opposing Respondents' Motion for Summary Judgment, Petitioner himself noted that he was required to show actual malice by "clear and convincing evidence." Memorandum in Opposition to Defendants' Motion for Summary Judgment at 184, citing *Yiamouyiannis v. Consumers Union of the United States, Inc.*, 619 F.2d 932, 940 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980). Moreover, citing *Nader v. deToledano*, 408 A.2d 31, 49 (D.C. 1979), *cert. denied*, 444 U.S. 1074 (1980), Petitioner urged the District Court to determine whether "sufficient factual disputes are presented from which a reasonable jury *could* find actual malice under the 'clear and convincing' standard at trial." Plaintiff's Memorandum at 185 (emphasis in original).

Thus, not only did Petitioner not object to the use of the convincing clarity standard in the District Court, he *specifically urged* its use. Under the circumstances, this Court should not grant review to save Petitioner's case on the basis of its forthcoming decision in *Liberty Lobby*.[21]

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21 Even if Petitioner had not urged the District Court to apply the standard he now disavows, Respondents submit that the District of Columbia Circuit panel's decision in *Liberty Lobby* is wrong. The issues in *Liberty Lobby* have been fully briefed and argued. Respondents respectfully direct the Court's attention to CBS Inc.'s Brief filed in that case. *See* Brief *Amici Curiae* of American Newspaper Publishers Association et al. in Support of Petitioners, *Anderson v. Liberty Lobby*, No. 84-1602 (July 18, 1985).

CONCLUSION

After twelve years of pretrial litigation, a trial in this case would be limited to the unimportant issues of how many sons a person had and whether all or all but one person interviewed about a specific event contradicted Petitioner's story. In the particular context of this media report on a matter of the highest public concern, Petitioner has failed entirely to offer any persuasive reason for this Court to review the decision below. The Court of Appeals decided no important issues of federal law and no novel legal questions. The Writ should be denied.

Dated: May 16, 1986

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT

S.D. NEW YORK

No. 74 Civ. 434-CSH

April 4, 1985

ANTHONY HERBERT,

Plaintiff,

—v.—

BARRY LANDO, MIKE WALLACE, COLUMBIA BROADCASTING SYSTEM, INC., ATLANTIC MONTHLY COMPANY,

Defendants.

MEMORANDUM OPINION AND ORDER

HAIGHT, *District Judge*:

In the wake of this Court's partial grant of their motion for summary judgment,[1] defendants now move to dismiss the complaint on an alternative basis. They argue that since the Court has found nine of their eleven allegedly false and defamatory statements to be non-actionable, plaintiff cannot as a matter of law be regarded as damaged by the remaining two statements.

As to those two statements, I have concluded that a reasonable jury, properly instructed, could find that they were defamatory, false, and made with actual malice. The question is whether such findings, if made, arrived at by the jury, could in law support a verdict for any amount of damages, compensatory or punitive.

1 See 596 F.Supp. 1178 (S.D.N.Y. 1984) and memorandum opinion on reargument, February 27, 1985.

Answering that question in the affirmative, I deny the motion to dismiss the complaint.

Defendants rely on the doctrine of the "libel-proof" plaintiff. That doctrine may be asserted in two ways. The first argues that the plaintiff's reputation has been so irreparably stained by prior publications or acts that the tort of defamation, which redresses injury to reputation, has no application to a reputation that cannot be damaged. The second approach is to argue that the unchallenged or unactionable portions of the offending publication attribute to plaintiff characteristics so much more injurious than the challenged or actionable portions, that the latter cannot conceivably do any incremental, compensable damage. *Liberty Lobby, Inc. v. Anderson*, 746 F.2d 1563, 1568 (D.C. Cir. 1984).

Cardillo v. Doubleday & Co., Inc., 518 F.2d 638 (2d Cir. 1975), furnishes an example of the first approach. *Simmons Ford, Inc. v. Consumers Union of the United States, Inc.*, 516 F.Supp. 742 (S.D.N.Y. 1981) (Weinfeld, J.) illustrates the second. *Cardillo* held that the plaintiff, complaining of his portrayal as "taking part in various criminal enterprises," had been rendered libel-proof "by virtue of his life as a habitual criminal," 518 F.2d at 639. In *Simmons Ford* the manufacturer of an electric car sued a consumers' magazine for a scathingly unfavorable article. Plaintiff singled out, from the entire text, a false statement that the car did not conform to certain federal safety standards (in point of fact, the standards were inapplicable). Judge Weinfeld dismissed the action: "Given the abysmal performance and safety evaluations contained in the article, plaintiffs could not expect to gain more than nominal damages based on the addition to the article of misstatements relating to federal safety standards." 516 F.Supp. at 750.

The case at bar fits within the second of these "libel-proof" theories: that of incremental harm.[2] If the two statements I

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2 Defendants point to no prior condemnations of Herbert tarnishing his reputation to the point that their publications could harm him no further. *Cardillo* is therefore inapplicable. Even in cases where that

have held to be actionable are not compensable because Herbert is incrementally libel-proof, it is because of the principles applied by Judge Weinfeld in *Simmons Ford*.[3]

The plaintiff in *Simmons Ford* based its defamation suit upon only one passage, taken from the text of a lengthy article which damned plaintiff's electric car beyond hope of redemption. 516 F.Supp. at 744. Those other criticisms plaintiff did not challenge in its suit. In those circumstances, Judge Weinfeld was able to write:

> ". . . the portion of the article challenged by plaintiffs, could not harm their reputations in any way beyond the harm already caused by the remainder of the article. It may be acknowledged the reputation of the CitiCar was damaged by defendant's finding that CitiCar was 'Not Acceptable.' However, the blunt fact is that, in light of defendant's extensive and detailed testing procedures, if the article had made no reference to federal safety standards, or to the CitiCar's exemptions from them, the opinions expressed therein upon which the defendant concluded the car was 'Not Acceptable' would not give rise to any actionable claim in plaintiff's favor."
>
> *Id.* at 750.

The case at bar is different because Herbert challenges many of the assertions made about him in the program and the

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particular "libel-proof" concept arguably applies, the Second Circuit has subsequently warned that the doctrine "that our *Cardillo* case enumerated is a limited, narrow one, which we will leave confined to its basic factual context." *Buckley v. Littell*, 539 F.2d 882, 889 (2d Cir. 1976).

3 Plaintiff seeks to distinguish *Simmons Ford* on the ground that the court also concluded plaintiff could not establish actual malice; he argues that "the Court's application of the libel-proof doctrine was secondary to its primary holding." Letter of counsel dated March 28, 1985 at 3. That argument flies in the face of Judge Weinfeld's characterization of the doctrine as an "independent ground" for dismissing the complaint. 516 F.Supp. at 750.

article. In essence, the two statements I have held to be actionable accuse Herbert of being a liar.[4] There are numerous statements in the program and the article calling Herbert a liar.[5] Unlike the plaintiff in *Simmons Ford*, Herbert challenges them all.

In my view, that distinction inhibits application of the libel-proof doctrine, which is narrowly construed in any event. *Buckley v. Littell, supra.* In *Liberty Lobby, supra*, the District of Columbia Circuit rejected the doctrine with this discussion:

> "The appellees' second libel-proof theory is somewhat different. They claim that the unchallenged portions of these articles attribute to the appellants characteristics so much worse than those attributed in the challenged portions, that the latter cannot conceivably do any incremental damage. This apparently equitable theory loses most of its equity when one realizes that the *reason* the unchallenged portions are unchallenged may not be that they are true, but only that appellants were unable to assert that they were willfully false. In any event, the theory must be rejected because it rests upon the assumption that one's reputation is a monolith, which stands or falls in its entirety. The law, however, proceeds upon the optimistic premise that there is a little bit of good in all of us—or perhaps upon the pessimistic assumption that no matter how bad someone is, he can always be worse. It is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot, and one should not have been able to make that charge while knowing its falsity with

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4 Lando's statement in the article that Sergeant Major Bittorie "had no sons" casts doubt upon the veracity of Herbert's explanation to Lando of why Bittorie refused to back up Herbert's claims. 596 F.Supp. at 1212-13. Wallace's statement on the program that "to a man they say Herbert never once said to them that he had been relieved because he had tried to push war crimes charges" casts doubt upon the veracity of Herbert's account of when he first articulated that theory. 596 F.Supp. at 1217-19.

5 Some are collected in defendants' brief on this motion at 6-8.

> impunity. So also here. Even if some of the deficiencies of philosophy or practice which the appellees' articles are lawfully permitted to attribute to the appellants (which is not necessarily to say they are true) are in fact much more derogatory than the statements under challenge, the latter cannot be said to be harmless. Even the public outcast's remaining good reputation, limited in scope though it may be, is not inconsequential. ('He was a liar and a thief, but for all that he was a good family man.')."
>
> [746 F.2d at 1568 (emphasis in original).]

The Court of Appeals added a footnote:

> "There may be validity to the proposition that at some point the erroneous attribution of incremental evidence of a character flaw of a particular type which is in any event amply established by the facts is not derogatory. If, for example, an individual is said to have been convicted of 35 burglaries, when the correct number is 34, it is not likely that the statement is actionable. That is so, however, not because the object of the remarks is 'libel-proof,' but because, since the essentially derogatory implication of the statement ('he is an habitual burglar') is correct, he has not been libeled. That issue is not presented here, both because *none* of the repulsive attributes which the appellees imputed to the appellants have been established or conceded to be true, and because the statements which we find to have been improperly taken from the jury impute attributes which, while less heinous than those for which the appellees have a good-faith defense, are nevertheless quite separate and distinct from them."
>
> *Id.* at 1568 n.6 (emphasis in original).

The first of the factors described in the *Liberty Lobby* footnote applies here: none of the instances in which Herbert is meant to have lied "have been established or conceded to be true." It cannot be said on Herbert's behalf, however, that the attribute ascribed to him by the actionable statements—that he

is a liar—are "quite separate and distinct" from other statements to the same effect. For the same reason, the observation in *Liberty Lobby* text that "[i]t is shameful that Benedict Arnold was a traitor, but he was not a shoplifter to boot" does not mirror Herbert's situation. And I am mindful of Judge Sofaer's statement, rejecting the "libel-proof" defense in *Sharon v. Time, Inc.*, 599 F.Supp. 538, 586 (S.D.N.Y. 1984), that "Time's allegations were potentially more damaging to Sharon's reputation than the Report's findings."

Nevertheless, I conclude that if a plaintiff, who denies throughout that he is a liar, proves that two statements branding him a liar were false and malicious, he may be compensated for an injury to his reputation, even though he cannot prove malice in respect of other statements calling him a liar. To hold otherwise would sanction false, defamatory statements made with actual malice if accompanied by a sufficient number of false, defamatory statements where malice cannot be proved. That is not a particularly appealing result, and I do not believe that Second Circuit authority or Judge Weinfeld's analysis in *Simmons Ford* compel me to reach it. On the contrary, I agree with the *Liberty Lobby* court: "We see nothing to be said for the rule that a conscious, malicious libel is not actionable so long as it has been preceded by earlier assertions of the same untruth." 746 F.2d at 1568. That observation was made in the context of the first of the two "libel-proof" concepts, but it seems to me of general application. And I believe that a jury may apply its common sense to a fair allocation of compensable damages. *Cf. Baden v. Koch*, 79 Civ. 4296 (CSH) (S.D.N.Y. July 24, 1984) at slip op. 153-156.

I also conclude that a plaintiff in Herbert's position is entitled to seek the partial vindication of proving two false and defamatory statements were made with actual malice, even if in the circumstances the jury limits him to nominal damages. *Sharon v. Time, Inc.*, *supra*, at 586.

Finally, upon such proof Herbert would arguably be entitled to punitive damages, which of course proceed upon an entirely different theory from compensatory damages. In *Simmons Ford* Judge Weinfeld did not have to conjure with punitive damages, since his conclusion that no jury could find malice foreclosed the issue. But it is unquestionably the law in this circuit that punitive damages will lie for malicious defamation of public figures, even where compensatory damages are nominal. *Buckley v. Littell*, *supra*, at 897; *Goldwater v. Ginzburg*, 414 F.2d 324, 340 (2d Cir. 1969). For that independent reason, I deny defendants' motion.

The motion to dismiss the complaint is denied.

It is SO ORDERED.

Dated: New York, New York
April 4, 1985

Charles S. Haight, Jr.
U.S.D.J.